6-14-2017

State v. Chavez Appellant's Reply Brief Dckt. 44504

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44504**
Plaintiff-Appellant,	)	
	)	**Bonneville County Case No.**
v.	)	**CR-2015-14**
	)	
GUSTAVO CHAVEZ 2ND,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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Because The State Never Had The Opportunity To Examine Blancas At The ALS Hearing, His Testimony Was Hearsay And The District Court Erred On Intermediate Appeal When It Reversed The Magistrate Court's Ruling Excluding That Testimony

In his trial for driving under the influence, Chavez's defense was premised on the theory that it was his friend, Jesus Blancas, and not him who had been driving. (R., p.127.) Blancas was not available for trial, but he had previously testified at Chavez's Administrative License Suspension (ALS) hearing. (R., pp.119-20.) Chavez sought to enter the transcript of Blancas's ALS testimony at his criminal trial. (R., p.120; Tr., p.10, L.23 – p.11, L.21.) Determining that the transcript was hearsay and that no exception applied, the magistrate court correctly excluded the evidence. (R., p.120; Tr., p.14, Ls.3-14.)

As set forth in the state's opening brief, for Blancas's former testimony to be admissible under Rule 804(b)(1), Chavez was required to show (1) that Blancas was unavailable and (2) that his testimony was "given as a witness at another hearing of the same or a different proceeding" and "the party against whom the testimony is now offered … had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." That Blancas was unavailable for trial was uncontested (see Tr., p.11, Ls.11-21), but that was insufficient by itself. Chavez also had the burden of showing that "the party against whom" Blancas's former testimony would be offered "had an opportunity and similar motive" to examine him at the prior hearing. I.R.E. 804(b)(1). The party against whom Blancas's testimony would be offered at the criminal trial was the prosecutorial authority of the state. Because the state was not a party to Chavez's ALS hearing and had no opportunity to cross-examine Blancas, the exception

for former testimony of an unavailable witness did not apply, and the magistrate court was correct to exclude the hearsay.

On intermediate appeal, however, the district court erroneously reversed the magistrate court's ruling, holding that "the hearing officer was a representative of the state in the same manner as a prosecutor in a criminal case" and, as such, the hearing officer could waive the state's right to cross-examine Blancas—and in fact waived that right when the hearing officer did not avail itself of its opportunity to examine Blancas. (R., pp.124-27.) The state concedes that ALS hearing officers may examine witnesses. See I.C. § 18-8002A(1)(a). The central and disputed issue, therefore, is whether the hearing officer who presided over Chavez's ALS hearing "was a representative of the state in the same manner as a prosecutor in a criminal case."[1] As he did below, and as the district court erroneously determined on intermediate appeal, Chavez continues to argue on appeal that the ALS hearing officer is the equivalent of a prosecutor and represents the state at ALS hearings. (Respondent's brief, pp.5-9.) This is not correct.

Contrary to Chavez's arguments on appeal, the Idaho Transportation Department hearing officer is not the equivalent of a prosecutor. The hearing officer does not—in fact cannot—represent the state in criminal prosecutions. Only county prosecutors, their deputies, and (under specific circumstances) special assistant attorneys general are authorized to represent the state as a party in criminal proceedings. I.C. §§ 31-2227, 31-2601–2603. The hearing officer is not a county prosecutor, nor a deputy

[1] Chavez claims that the state failed to raise this issue below. (Respondent's brief, p.7.) This assertion is disproved by the record. As shown in the state's augmentation—a motion for which was filed contemporaneously with this brief—the state raised this argument to both the district court on intermediate appeal (see Respondent's Brief in Opposition to Defendant's Appeal, p.3), and to the magistrate court in its Bench Memo (see p.1), which the magistrate received (Tr., p.13, Ls.20-23).

county prosecutor, nor a special assistant attorney general vested with any authority to represent the state in criminal proceedings. Rather, as explained in the state's opening brief, the state is not a party to ALS hearings. The prosecuting authority of the state receives no notice of such hearings. I.C. § 18-8002A(7). The prosecuting authority of the state was neither invited to nor present at Chavez's ALS hearing and, as such, had no opportunity to cross-examine Blancas. Because the state had no opportunity to cross-examine Blancas, the magistrate court correctly excluded the ALS hearing transcript as hearsay.

In listing the authority of ALS hearing officers, Chavez emphasizes that they are authorized to examine witnesses and take testimony. (Respondent's brief, pp.5-6.) That is of no consequence when determining whether the hearing officer represents the state in its prosecutorial authority. As shown by the state in its opening brief, the hearing officer's authority, as an administrative law judge, mirrors that same authority conferred upon all trial judges of the State of Idaho. (See Appellant's brief, pp.7-8.) Hearing officers may administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas, regulate the course and conduct of ALS hearings, and make a final ruling on the issues before them. I.C. § 18-8002A(1)(f). And so may trial judges. See I.C. §§ 1-1603(7), 1-1901(4), 9-1401 (administer oaths); I.R.E. 614 (examine witnesses); I.C. § 1-1903, I.C.R. 26 (receive evidence); I.C.R. 17, I.R.C.P. 45 (issue subpoenas); I.C. §§ 1-1603, 1-1901(1), I.R.E. 611(1) (regulate the course and conduct of trials); I.C. § 1-701 (determine matters before them).

Chavez also argues that, because hearing officers are appointed by the director of the Idaho Transportation Department, and the Idaho Transportation Department is an

executive department of the state, the hearing officer was the equivalent of a prosecutor. (Respondent's brief, pp.7-8.) This argument is a *non sequitur*. First, the state is aware of no administrative agency of the State of Idaho that is not an executive department. This has no bearing on determining whether a hearing officer is an administrative law judge or a prosecutor. Second, it is irrelevant because, under the Idaho Constitution, prosecuting attorneys are not executive officers; they are officers of the judicial branch. See Idaho Const. art. V, § 18.

The argument that the hearing officer represents the state in its prosecutorial capacity because he is employed by a department of the state and may examine witnesses is no less applicable to magistrate or district judges, both of whom are employed by the state (and by the same branch of government as prosecutors) and may examine witnesses. Following Chavez's logic to its natural conclusion, court-appointed public defenders, who are also state employees and may examine witnesses, would qualify as representatives of the state in criminal proceedings.

But they do not. As shown above, only county prosecutors, their deputies, and special assistant attorneys general may represent the state in criminal proceedings. Contrary to the district court's conclusions on intermediate appeal, the hearing officer is not "a representative of the state in the same manner as a prosecutor in a criminal case." The state is not even a party to ALS hearings—it is not represented by its only authorized representative in criminal proceedings—and the ALS hearing itself is an administrative proceeding, not a criminal proceeding. Because the state was not a party to Chavez's ALS hearing, it had no opportunity to examine Blancas at that hearing. The transcript of Blancas's testimony, therefore, was hearsay and properly

excluded by the magistrate court. The district court erred when it concluded otherwise. The opinion of the district court on intermediate appeal should be reversed.

II.
Because The Probative Value Of The Cumulative Testimony Was Outweighed By Its Potential For Harm, The Magistrate Court Properly Precluded Chavez From Testifying That Blancas Appeared At His ALS Hearing

As set forth in the state's opening brief, after the magistrate correctly excluded the ALS hearing transcript on hearsay grounds, defense counsel sought a ruling on whether Chavez could at least testify that he had witnessed Blancas testifying at his ALS hearing. (Tr., p.14, L.17 – p.15, L.21.) The purpose of eliciting such testimony, as the district court understood on intermediate appeal, "would be to show the jury that Blancas actually existed, and was not part of a made up story by Chavez." (R., p.129.) Indeed, defense counsel had explained to the trial court that "[j]ust the fact that [Blancas] exists is what I'm grappling for." (Tr., p.15, Ls.20-21.)[2]

The magistrate court, however, excluded the testimony, recognizing that any testimony about Blancas's appearance at the ALS hearing would only be a backdoor to getting the substance of Blancas's testimony (which was hearsay) in at trial. (Tr., p.15, L.22 – p.16, L.20.) On intermediate appeal, the district court concluded that the ruling was an abuse of the magistrate's discretion. (R., pp.127-30.) The district court's legal conclusion was erroneous.

The sole purpose of the anticipated testimony, as explained by Chavez below, was foundational: to offer a basis for Chavez's knowledge that Blancas was a real

[2] In the Hearing Transcript of the same proceedings, defense counsel is reported as saying "[j]ust the fact that he exists is what *I'd be offering it* for" (11/20/2015 Tr., p.13, Ls.22-23 (emphasis added)), which appears a little clearer, though to the same effect.

person who existed. But Chavez laid the foundation for his personal knowledge of Blancas's existence. Chavez testified that he had known Blancas for 20 years (Tr., p.119, Ls.18-22); that he had seen him at the party he attended on the evening of his DUI (Tr., p.111, L.22 – p.112, L.8); and that he had left the party with Blancas, with Blancas driving (Tr., p.112, L.5 – p.113, L.11). That Chavez also knew Blancas existed because Blancas had testified at his ALS hearing is merely cumulative of the foundation Chavez was permitted to lay and therefore not relevant.

The state noted in its opening brief that "Chavez testifying that on a certain date he heard Blancas's voice on a phone call … does not make the fact that Blancas existed any more probable than the rest of the evidence Chavez properly presented." (Appellant's brief, p.11.) On appeal, Chavez asserts that Blancas *personally* appeared at the ALS hearing. (Respondent's brief, p.10, n.1.) The state was previously informed that the entire ALS hearing was conducted telephonically. (See Bench Memo, p.1; Resp. Brief in Opp., pp.3-4.) Regardless, it is a distinction without a difference in this case. Assuming that Blancas appeared personally, that Chavez *saw* him at his ALS hearing is still mere foundation for Chavez's personal knowledge of Blancas's existence. It adds nothing to the foundation properly laid by the defense for Chavez's knowledge of Blancas's existence—such as Chavez's 20-year friendship with Blancas (Tr., p.119, Ls.18-22) and seeing him at the party during the evening of his DUI (Tr., p.111, L.22 – p.112, L.8).

Moreover, that Chavez could testify that he had *seen* Blancas on a certain date, as cumulative foundation for his testimony that Blancas was a real person who existed, still does not answer the central issue in this case. As Chavez notes on appeal, and the

state agrees, "[t]he issue of who was driving was central to the trial." (Respondent's brief, p.12.) But the issue of Blancas's existence is ancillary to the question of who was driving the car. Chavez testifying that Blancas appeared at an ALS hearing, being offered only as the basis for Chavez's knowledge that Blancas existed, is even further removed from the central issue of who was driving the car. Under the circumstances of this case, that Blancas may have testified at an ALS hearing—without any indication of the substance of that testimony—is simply not relevant evidence.[3]

Even if an argument could be made that Chavez testifying that Blancas had previously testified at his ALS hearing, as yet an additional basis for Chavez's personal knowledge that Blancas was a real person who existed, was marginally relevant evidence, the magistrate court could still exclude such evidence because it is needless and cumulative. See I.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by … the needless presentation of cumulative evidence."). On appeal, Chavez asserts that the magistrate court failed to provide any legal basis for its decision to exclude testimony from Chavez that Blancas had testified at his ALS hearing. (Respondent's brief, p.10.) But Idaho Rule of Evidence 403 does not require a specific invocation by the trial court; it merely requires

[3] Chavez also argues that the testimony was "relevant to why Blancas was absent from the trial—*i.e.*, he's 'already been before, so he couldn't do it again.'" (Respondent's brief, p.10.) Chavez cites to the transcript produced for intermediate appeal to the district court for this quote. A separate transcript was produced for this appeal and the direct quotation is found at Tr., p.140, Ls.22-23. Regardless, this argument fails. First, it was never presented to the trial court and therefore is not preserved. See Rammell v. Idaho State Dept. of Ag., 147 Idaho 415, 421, 210 P.3d 523, 529 (2009) (issues must be raised at each stage of the appeal). Second, as noted below, Chavez's statement that Blancas had "already been before, so he couldn't do it again" was never objected to and thus was part of the evidence properly before the jury. Even if the trial court had abused its discretion by ruling that such evidence *should be* excluded, such error was harmless because the evidence was ultimately presented to the jury.

the court to weigh the probative value of evidence against its potential for unfair prejudice. Because this evidence is merely cumulative foundation for evidence which is, at best, ancillary to the central issue at trial—who was actually driving the car—its probative value is essentially *nil* and it is properly excluded under Rule 403.

Finally, as noted in the state's opening brief (see Appellant's brief, pp.13-15), even if the trial court abused its discretion when it excluded Chavez from testifying that he had witnessed Blancas testifying at his ALS hearing, such error would be harmless. Chavez, without objection, in fact alluded to Blancas's previous appearance (Tr., p.140, Ls.17-23), but that did not affect the jury's verdict. And the testimony Chavez sought to present was merely cumulative foundation of Chavez's basis for knowledge of Blancas's existence, which fact was never contested by the state. Its admission, therefore, would not have affected the outcome of this case.

Because testimony from Chavez that he had witnessed Blancas testify at a separate ALS hearing, given as foundation for Chavez's personal knowledge that Blancas was a real person who existed—a fact that was uncontested at trial—is merely cumulative of other foundation properly laid and has no added probative value, the trial court properly excluded the testimony. Even had the trial court abused its discretion by excluding the testimony, such error would not have affected the outcome of this case and so would necessarily be harmless. The district court erred when it concluded otherwise. The district court's intermediate appellate decision, reversing the magistrate court, should be reversed.

CONCLUSION

The state respectfully requests that this Court reverse the erroneous intermediate appellate decision of the district court and affirm Chavez's conviction for driving under the influence.

DATED this 14th day of June, 2017.

_/s/ Russell J. Spencer_____
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 14th day of June, 2017, served two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT by placing the copies in the United States mail, postage prepaid, addressed to:

JORDAN S. CRANE
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_/s/ Russell J. Spencer_____
RUSSELL J. SPENCER
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RJS/dd